No. 84-91

In the Supreme Court of the United States

OCTOBER TERM, 1983

ELSA SINGMAN, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the use or threatened use of law or force is an essential element of the federal crimes prohibiting the holding of another to a condition of involuntary servitude.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Elsa Singman, Lily Judah, Nasim Mussry, Jack Sassoon, Hilda Sassoon, Moses Aslan, Saul Mizrahie, and Al Mizrahie respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed in this case on March 1, 1984.[1]

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[1]Petitioners, Elsa Singman, Lily Judah, Nasim Mussry, Jack Sassoon, Hilda Sassoon, Moses Aslan, Saul Mizrahie, and Al Mizrahie, were defendants-appellees in the court below. Due to an

OPINIONS BELOW

The opinion of the court of appeals in this case is reported as *United States v. Mussry*, 726 F.2d 1448 (9th Cir. 1984), and is attached hereto as Appendix A at pp. A1-A14. No written opinion was rendered by the District Court for the Central District of California. A transcript of the oral ruling by the district court is attached hereto as Appendix C at pp. A17-A23.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 1, 1984. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on June 1, 1984. [Appendix B at p. A15]. This petition for certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

United States Code, Title 18, Section 1584:

> Whoever knowingly and willfully holds to involuntary servitude or sells into any condition of involuntary servitude, any other person for any term, or brings within the United States any person so held, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

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apparent typographical error, petitioners Jack Sassoon and Hilda Sassoon are listed jointly in the caption of the opinion of the court below as "Jack Sassoon, Nee Mussry." Respondent United States of America was the plaintiff-appellant in the court below. Two other parties, David Mussry and Mordecai Sassoon, were listed as defendants-appellees in the caption of the opinion of the court below and were named as defendants in the indictment returned in the district court. David Mussry and Mordecai Sassoon, however, are Indonesian nationals who have not voluntarily traveled to the United States to submit to the jurisdiction and processes of the district court.

United States Code, Title 18, Section 1583:

> Whoever kidnaps or carries away any other person, with the intent that such other person be sold into involuntary servitude or held as a slave; or
>
> Whoever entices, persuades, or induces any other person to go on board any vessel or to any other place with the intent that he may be made or held as a slave, or sent out of the country to be so made or held —
>
> Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

United States Code, Title 18, Section 1581(a):

> Whoever holds or returns any person to a condition of peonage, or arrests any person with the intent of placing him in or returning him to a condition of peonage, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

These proceedings have focused on the interpretation, meaning, and scope of the three federal criminal statutes which prohibit a "holding" of a person to a condition of involuntary servitude, 18 U.S.C. §§1584, 1583, and 1581(a). Specifically, the question raised herein, decided differently by the district court and the court of appeals below, is whether "law or force" — that is, the use or threatened use of physical restraint, physical violence, or legal confinement — is an element of these involuntary servitude statutes.[2]

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[2]Though the three statutes employ slightly different phraseology — "holds to involuntary servitude" in §1584, "held as a slave" in §1583, and "holds to a condition of peonage" in §1581(a) — the

The jurisdiction of the district court was invoked pursuant to 18 U.S.C. §3231 by the return of a 51-count indictment on September 23, 1982, in the District Court for the Central District of California. The indictment charged petitioners with numerous federal criminal violations arising from petitioners' alleged involvement in bringing persons to the United States from Indonesia to work.[3] Counts 2 through 31 of the indictment charged petitioners with substantive violations of the involuntary servitude statutes, 18 U.S.C. §§1584, 1583, 1581(a), and Count 1 charged petitioners with conspiring to violate these and other federal criminal statutes.

With respect to the charged violations of the involuntary servitude statutes, the indictment alleged, in general terms, that petitioners entered into agreements with various Indonesian nationals concerning employment in the United States for a specific term; that petitioners arranged for the travel of the Indonesian nationals to the United States; and that, following entry into the United States, petitioners took possession of the passports, visas,

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common predicate of the statutes is their prohibition against a holding to involuntary servitude. For example, peonage has been defined by this Court as involuntary servitude for the purpose of liquidating a debt. *Clyatt v. United States*, 197 U.S. 207, 215 (1905). Similarly, the terms slavery and involuntary servitude have been found to be substantially synonymous in the context of these criminal statutes. See *United States v. Shackney*, 333 F.2d 475, 483-85 (2d Cir. 1964). Thus, a holding to involuntary servitude is a common element of these three criminal statutes. Throughout this petition, these statutes will be referred to collectively as the "involuntary servitude statutes."

[3]The petitioners are, and have been throughout these proceedings, free on bond. No defendants or witnesses are in custody. Some of the Indonesians designated by the district court as material witnesses have returned to Indonesia either following the taking of their depositions or the waiving of such pursuant to Fed.R.Crim.P. 17(f).

return airline tickets, and money of the Indonesian nationals in order to hold those persons to the completion of the agreed term of employment and to prevent those persons from leaving their employment or from returning to Indonesia prior to the completion of the term of employment. It was not alleged that petitioners utilized "law or force" either to compel labor or service or to subjugate the will of any of the Indonesian workers.

On January 31, 1983, the district court ordered the government to file a bill of particulars addressing, in part, the means allegedly used to hold persons to a condition of involuntary servitude. The government filed its bill of particulars on February 18, 1983. As to the charges involved in this petition, the bill of particulars did not allege that "law or force" was used or threatened.[4] Rather, the bill of particulars set forth extensive and numerous allegations concerning the individual and general background of these Indonesians and the conditions of their employment. According to the government's particulars, petitioners effected the "holding" of these Indonesians to involuntary servitude by having

> structured situations in which the workers were placed in a strange country with no friends; had no access to any nearby Indonesian community; lacked outside contacts to whom they could turn for assistance; could not speak English; were without work permits or Social Security cards, necessary to obtaining alternative employment;

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[4]With respect to five of the thirty substantive counts of the indictment involving a holding to involuntary servitude, the government did allege some use of "law or force." The five counts, Counts 16, 24, 28, 29, and 30, were not dismissed by the district court and were not the subject of the government's appeal to the court of appeals. These five counts are therefore not at issue with respect to this petition.

> lacked identification; had no immigration status; and possessed practically no means by which to seek other employment (e.g. transportation, money, work reference).

[E.R.[5] 255]. Concurrently with its filing of the bill of particulars, the government urged the district court to adopt a new standard for the definition and application of the involuntary servitude statutes, and to abandon the traditional "law or force" standard. The government's suggested test was that a holding to involuntary servitude is shown whenever a worker continues in an employment situation because the worker perceives that leaving would create a risk to a "heightened personal interest" of that worker. [E.R. 291-303].

On March 4, 1983, the district court granted in part a motion to dismiss the involuntary servitude allegations because of a failure to allege the use or threatened use of law or force. The court dismissed Counts 2 through 15, 17 through 23, 25 through 27, and 31.[6] The district court also struck from Count 1, the conspiracy charge, all references to slavery, peonage, involuntary servitude and enticement into such conditions. In rejecting the government's proposed test, the district court ruled as follows:

> I perceive the law in this area to be reasonably well developed, which is a conclusion that prohibits my selection of any novel theory or criterion, such as the "heightened personal interest" test, by which I would judge the "holding" requirement of the charging statutes.

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[5]"E.R." refers to the excerpts of the clerk's record filed with the court of appeals, and to the page numbers therein.

[6]The government did not appeal from the dismissal of Count 18 of the indictment. That count, as well as the five counts not dismissed by the district court, see note 4 *supra*, are not at issue in this petition.

I conclude that the legal standard for judging the sufficiency of a charge of either "peonage", as used in 1581, or "involuntary servitude", as used in the other statutes, involves:

(i) subjugation of the will of the servitor

(ii) which was accomplished by either law or force, or the meaningful threat of either, or, indeed, of any combination of the above, and

(iii) which compels service or the continuation of service.

Most of the holdings charged in the Indictment here involve presence in a strange country on the part of an alien, with no capability in its language, no friends to turn to for help, no work permit or Social Security card, custody of passport and return plane ticket in one of the defendants rather than the alien, and no apparently ready means for seeking other employment.

That combination, while surely a baleful state of affairs, does not measure up to the "force or law" requirement that I perceive. Rather, it resembles the choice entailing "consequences that are exceedingly bad," described by Judge Friendly in the *Shackney*[7] case.

[Appendix C, pp. A18-A19].

On April 6, 1983, the government filed a timely notice of appeal.[8]

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[7]*United States v. Shackney*, 333 F.2d 475 (2d Cir. 1964).

[8]As noted above, see footnote 6, the government did not appeal from that portion of the district court's order dismissing Count 18. The counts included in the appeal to the court of appeals and in this petition are portions of Count 1, and all of Counts 2-15, 17, 19-23, 25-27, and 31.

On March 1, 1984, the Court of Appeals filed its judgment and opinion reversing the rulings of the district court and remanding the case. The Court of Appeals — contrary to the decision of the Second Circuit in *United States v. Shackney,* 333 F.2d 475 (2d Cir. 1964), and contrary to the principles announced in this Court's seminal opinion in *Clyatt v. United States*, 197 U.S. 207 (1905) — rejected the argument that the use or threatened use of law or force is an element of the involuntary servitude statutes. Instead, the Court of Appeals enunciated a totally new standard for defining the scope of the involuntary servitude statutes. It held that the involuntary servitude statutes are violated whenever labor is compelled by improper or wrongful conduct of a defendant (as opposed to labor which is compelled by proper or rightful conduct of a defendant and as opposed to servitude caused by external factors such as "economic necessity" or "societal conditions") who intends to cause and does cause the other person to believe, and would cause a reasonable person of the same general background and experience to believe, that he or she has no alternative but to perform the labor demanded. [*United States v. Mussry,* 726 F.2d 1448, 1453 (9th Cir. 1984); Appendix A, pp. A8-A9].

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With General Principles Enunciated In Prior Decisions Of This Court As To The Proper Interpretation Of 18 U.S.C. § § 1584, 1583, And 1581(a).

The focal point of the criminal proscriptions contained in sections 1584, 1583, and 1581(a) of Title 18 of the United States Code is a holding to involuntary servitude. Sections 1584 and 1581(a) directly prohibit a "holding" to a condition of involuntary servitude, while section 1583

criminalizes certain conduct undertaken with the intent to effectuate such a "holding."

In exploring the reach of these criminal statutes, the Ninth Circuit below observed that "[t]he question of what forms of coercion may serve as the basis for a finding of a violation of the involuntary servitude statutes is not a simple one." *United States v. Mussry,* 726 F.2d 1448, 1482 (9th Cir. 1984); Appendix at p. A6. The court acknowledged that the use, or threatened use, of law or physical force was the most common method of forcing another to enter or remain in a state of involuntary servitude, but rejected the idea that the use, or threatened use, of law or physical force was an essential element of the involuntary servitude statutes. 726 F.2d at 1452; Appendix at p. A8. Instead, the Ninth Circuit held that the criminal prohibitions at issue extend to situations where labor is compelled or coerced *by any means,* so long as the compulsion originates with and emanates from the accused's "improper or wrongful" conduct. 726 F.2d at 1453; Appendix at pp. A8-A9.

The Ninth Circuit's rejection of law or physical force as the line separating conduct that is and is not criminally proscribed by the involuntary servitude statutes conflicts with principles announced in prior decisions of this Court.

The seminal case of *Clyatt v. United States,* 197 U.S. 207 (1905), presented this Court with its first opportunity to analyze one of the involuntary servitude statutes. In *Clyatt,* the Court reviewed and reversed a conviction for returning two men to a condition of peonage under the Act of March 2, 1867, 14 Stat. 546, the ancestor of 18 U.S.C. §1581.[9] In this case of first impression, the Court both

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[9]The third clause of the 1867 Act, making it a crime to "hold, arrest, or return . . . any person . . . to a condition of peonage," is essentially identical to the provisions of 18 U.S.C. §1581(a).

posited a definiton of peonage and delineated the parameters of the statute's prohibitions. Peonage was defined by the Court as a form of "compulsory service" or "involuntary servitude" involving the element of indebtedness. 197 U.S. at 215. The criminal prohibitions against peonage, however, reached only those situations where "law or force" compelled the labor in question:

> A clear distinction exists between peonage and the voluntary performance of labor or rendering of services in payment of a debt. In the latter case the debtor, though contracting to pay his indebtedness by labor or service, and subject like any other contractor to an action for damages for breach of that contract, can elect at any time to break it, and *no law or force compels performance or a continuance of the service.*

Id. at 215-16 (emphasis added). That this "clear distinction" hinged upon *physical* force was underscored by the dissent of Mr. Justice Harlan on the ground that the physical barbarities revealed in the record were sufficient, in his opinion, to bring the defendant's conduct within the reach of the statute. 197 U.S. at 223.

Subsequent to the decision in *Clyatt,* the "law or force" standard has been reiterated by this Court on several occasions. See, *e.g., Bailey v. Alabama,* 219 U.S. 219, 242-43 (1911); *United States v. Reynolds,* 235 U.S. 133, 144 (1914); and *Pollock v. Williams,* 322 U.S. 4, 8-9 (1944). Of particular import is the succinct restatement of the "law or force" standard by Mr. Justice Holmes: "Peonage is service to a private master at which a man is kept *by bodily compulsion* against his will." *Bailey v. Alabama,* 219 U.S. at 246 (Holmes, J., dissenting; emphasis added). This Court has also recognized that the peonage statute (the Act of March 2, 1867) was enacted

as the result of Congress' agitation over the use of federal troops to physically arrest persons who had escaped from a condition of peonage. *United States v. Gaskin,* 320 U.S. 527, 529 (1944).

While this Court has not yet had an opportunity to address fully the scope of 18 U.S.C. §1584 or its predecessor statutes, it has commented on the meaning of the phrase "involuntary servitude" in the context of the Thirteenth Amendment. In the *Slaughter-House Cases,* 83 U.S. (16 Wall.) 36, 69 (1873), the Court indicated that the Thirteenth Amendment's "exception of servitude as a punishment for crime gives an idea of the class of servitude that is meant." This language clearly envisions, as does the "law or force" language of *Clyatt,* that some form of physical restraint, physical compulsion, or physical confinement is necessarily incident to a condition of "involuntary servitude."

The Ninth Circuit, in its opinion below, gave little or no heed to the prior decisions of this Court or to the history of the statutes involved. Rather, the Ninth Circuit attempted to minimize the importance of the "law or force" language from *Clyatt* by noting that *Clyatt* did not expressly state that "the 'force' compelling continued labor must be physical force." 726 F.2d at 1452 n.5; Appendix at pp. A6-A7. The Ninth Circuit's reading of *Clyatt* — that the word "force" includes coercion of any type — is, however, untenable. On one hand, this Court's inclusion in *Clyatt* of the word "law" would be unnecessary, since "law" is but one means of coercion. *Cf. Bailey v. Alabama,* 219 U.S. at 243 ("law" is the "readiest means of compulsion"). On the other hand, this Court's drawing of a "clear distinction" in *Clyatt* between prohibited and permissible forms of service would be made meaningless. Indeed, under the Ninth Circuit's reading of *Clyatt,* the infusion into an employment situation of any coercive element would transform that employment into involuntary servitude.

The Ninth Circuit's abrupt and radical departure from the principles established by this Court's previous decisions justifies the grant of certiorari to review the judgment and opinion below.

2. The Decision Below Conflicts With The Decision Of Another Court Of Appeals As To The Proper Interpretation Of 18 U.S.C. § § 1584, 1583, And 1581(a).

The Ninth Circuit below held that a "holding in involuntary servitude," within the meaning of 18 U.S.C. § § 1584, 1583, and 1581(a), "occurs when an individual coerces another into his service by improper or wrongful conduct that is intended to cause, and does cause, the other person to believe that he or she has no alternative but to perform the labor." 726 F.2d at 1453; Appendix at p. A8. The court held as well that the use or threatened use of law or physical force need not be pleaded and proved in a prosecution under the involuntary servitude statutes. *Id.* In so holding, the Ninth Circuit conceded that its interpretation of the involuntary servitude statutes was in direct conflict with that adopted by the Second Circuit in the majority opinion of *United States v. Shackney,* 333 F.2d 475 (2d Cir. 1964).[10] 726 F.2d at 1452-53; Appendix at pp. A7-A8.

In *Shackney,* the Second Circuit reviewed a conviction on six counts of holding another to involuntary servitude under 18 U.S.C. § 1584. Because the facts in *Shackney* did not involve the use or threatened use of law or physical force, the Second Circuit was required to define the reach

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[10]Though the Ninth Circuit's opinion below and the concurring opinion in *Shackney,* 333 F.2d at 487-88 (Dimock, J., concurring), are consistent in their rejection of the law or physical force standard, the two opinions conflict as to their definitions of the prohibition against a holding to a condition of involuntary servitude. *Compare* 726 F.2d at 1453-54, Appendix at pp. A8-A9, *with* 333 F.2d at 488.

of the criminal prohibition against a holding to involuntary servitude.

Judge Friendly, writing for the majority in *Shackney*, undertook an exhaustive review of the history of the involuntary servitude statutes (including the peonage statute), their ancestors, and their operative language, as well as a thorough canvass of the prior application and judicial construction of the relevant criminal prohibitions. 333 F.2d at 481-86. Finding the term "holds to involuntary servitude" to be "history-laden," Judge Friendly concluded that a clear and intelligible line separated that conduct made felonious by the involuntary servitude statutes and that conduct which, though not criminal, might be viewed as reprehensible. 333 F.2d at 486-87. That intelligible line, according to the Second Circuit, was the use or threatened use of law of physical force: the involuntary servitude statutes applied "only to service compelled by law, or force or by threat of continued confinement of some sort." 333 F.2d at 487.[11]

Notably, each court of appeals which has subsequently considered the application of the involuntary servitude statutes has relied on the Second Circuit's decision in *Shackney*. In *United States v. Bibbs*, 564 F.2d 1165, 1167-68 (5th Cir. 1977), the Fifth Circuit observed that, historically, the compulsion which was necessarily inci-

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[11]Judge Friendly found additional support for his interpretation of the involuntary servitude statutes in two canons of statutory construction: one, that a federal court must interpret a statute to avoid "grave and doubtful constitutional questions;" and, two, that "[w]hen Congress leaves to the Judiciary the task of imputing to Congress an undeclared will" with respect to a criminal statute, "the ambiguity should be resolved in favor of lenity." 333 F.2d at 487 (*quoting United States v. Delaware & Hudson Co.*, 213 U.S. 366, 407-08 (1909), and *Bell v. United States*, 349 U.S. 81, 83 (1955)). Moreover, Judge Friendly recognized that the expansion of the reach of these criminal statutes, absent clear evidence of legislative purpose, was a task for Congress, not for a court. *Shackney*, 333 F.2d at 487.

dent to conditions of slavery or involuntary servitude resulted from the operation of state law or the fear generated by public punishment. The Fifth Circuit concluded that the prohibitions against holding a person to involuntary servitude are violated "if the defendant has placed [the employee] in such fear of physical harm that the victim is afraid to leave." *Id.* at 1168. In addition, the Fourth Circuit has on two occasions cited *Shackney* with approval. *See United States v. Harris,* 701 F.2d 1095, 1100 (4th Cir. 1983) ("The combination of . . . guarding . . . with the beating of other workers" is sufficient to support a conviction under the statutes) *and United States v. Booker,* 655 F.2d 562, 567 (4th Cir. 1981) ("The threat of violence or confinement, backed sufficiently by deeds . . . , suffices to subjugate human beings to the will of another").

In rejecting the Second Circuit's "law or force" standard, the Ninth Circuit here engaged in little or no historical analysis of the involuntary servitude statutes and seemingly paid little attention to the legislative purpose underlying these criminal prohibitions. Rather, the Ninth Circuit focused on what it perceived as the "improper or wrongful conduct" alleged in the indictment and bill of particulars, and seemingly concluded that Congress, in a manner consistent with the Thirteenth Amendment, could have and therefore should have prohibited this bad conduct. See 726 F.2d at 1453-54 and 1455; Appendix at pp. A8-A10 and A13.

This direct conflict between the circuits as to the proper interpretation of federal criminal statutes justifies the grant of certiorari to review the judgment and opinion below.

3. The Decision Below Raises Substantial Questions Affecting The Administration And Enforcement Of Federal Criminal Statutes.

The Ninth Circuit's opinion in this case greatly expands the reach of the federal crimes enumerated in the involuntary servitude statutes. In rejecting the Second Circuit's historically-supported "law or force" standard, the Ninth Circuit here has apparently sanctioned serious felony prosecutions on the basis of a disgruntled employee's after-the-fact claim that his will to quit had been subdued by his employer's "improper or wrongful" conduct. The broad and amorphous sweep of the Ninth Circuit's language will, without doubt, impact substantially on the evenhanded and efficient administration and enforcement of these federal criminal statutes.

On a very basic level, the Ninth Circuit's reading of the prohibitions against a holding to involuntary servitude presents a signficant risk of arbitrary application and enforcement. These prohibitions, as interpreted in the opinion below, fail to provide sufficiently definite and comprehensible standards to guide policemen, prosecutors, judges, and juries, whose duty it is to apply the criminal prohibitions at issue.

For example, the Ninth Circuit emphasized that only the "improper or wrongful" conduct of an employer, as opposed to his proper or rightful conduct, subjects him to prosecution. 726 F.2d at 1453; Appendix at pp. A8 and A9. Yet, the opinion below offers no definition of these terms. Nor does it suggest on what bases or according to whose sensitivities the moral distinctions between proper and improper and between right and wrong should be drawn. Similarly, the opinion below exempts from the statutes' coverage those employment situations where the labor-inducing coercion is caused by "economic necessity"

or "societal conditions" or where the labor-inducing coercion is the result of an employer "simply tak[ing] advantage of circumstances created by others." 726 F.2d at 1453; Appendix at p. A9. Again, these terms and phrases are nowhere defined or explained. Where does "societal" responsibility end and where does personal responsibility begin? To what extent can one take advantage of the acts of others without incurring personal responsibility? How is responsibility to be apportioned when coercion results from conduct or conditions which are part societal and part personal, or part proper and part improper? In short, criminal responsibility under the Ninth Circuit's reading of these statutes is left to be determined on an *ad hoc,* subjective basis. The potential for arbitrary application is manifest.

In addition, the Ninth Circuit's reading of the involuntary servitude statutes makes them easy tools for blackmail and other serious abuse. As Judge Friendly has observed, "Friction over employment punctuated by hotheaded threats is well known and inevitable." *United States v. Shackney,* 333 F.2d at 487. An after-the-fact claim of an employee that his employer engaged in "improper or wrongful" conduct would seem sufficient, according to the Ninth Circuit, to bring the awful machinery of the criminal law into play.

In this context, it bears emphasis that the involuntary servitude statutes are likely to be used by prosecutors with greater frequency and in wider ranging contexts than ever before. *See U.S. News & World Report,* January 16, 1984, at p. 68, and *Time,* September 19, 1983, at p. 99. It has been reported that the Civil Rights Division of the United States Department of Justice considers prosecutions under these statutes to be a "high priority," and is

currently pursuing twenty-eight such prosecutions.[12] *Time, supra,* at p. 99. The renewed interest in the involuntary servitude statutes appears to be based in part on claims that 10,000 people are being held in some form of coerced labor or debt bondage in the eastern United States alone. *U.S. News & World Report, supra,* at p. 68.

A grant of certiorari is needed to insure that these federal criminal statutes will be applied, administered, and enforced in an evenhanded and nonarbitrary manner.

4. The Decision Below Raises An Important Question As To The Proper Role Of A Federal Court In Interpreting A Federal Statute.

In rejecting the "law or force" standard, the Ninth Circuit has wrenched the history-laden phrase, "holds to involuntary servitude," out of its historical context, and has effectively redefined and reshaped that phrase and its concomitant criminal proscriptions. Rather than searching for the intent of Congress in enacting the criminal statutes at issue, the Ninth Circuit has here acted as if it were a legislature, apparently deciding that "improper or wrongful conduct" should be criminal and concluding therefore that it was. A federal court, however, does not possess such legislative powers; it may not redefine the words of a criminal statute to extend its coverage

> simply because it may seem to [the court] that a similar policy applies, or upon speculation that, if the legislature had thought of it, very likely broader words would have been used.

McBoyle v. United States, 283 U.S. 25, 27 (1931) (per Holmes, J.).

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[12]The Ninth Circuit's expectation "that criminal prosecutions under the involuntary servitude and peonage statutes will occur only in rare circumstances," 726 F.2d at 1455; Appendix at p. A14, appears to be quite unrealistic.

Legislation by a court is, of course, inimical to our democratic system. A court is both ill-suited and without the mandate of the People to assess the competing policy considerations necessary to achieve "the delicate balance . . . between that conduct which is deemed criminal and that which in our economic system is better labeled reprehensible." H. H. Shapiro, *Involuntary Servitude: The Need For A More Flexible Approach,* 19 Rutgers L. Rev. 65, 84 (1964). Indeed, a wide range of factors would be and should be considered by a legislature prior to a decision to criminalize "improper or wrongful" conduct:

> [B]efore deciding to make such conduct a felony, punishable with up to five years' imprisonment, a legislator would wish to weigh the advantages to society in providing deterrence and retribution where the conduct had in fact occurred against the risk that innocent employers might be victimized by disgruntled employees able to convince prosecutors, and ultimately juries, of their story, and the consequent possible preferability of dealing with the evil by less drastic means.

United States v. Shackney, 333 F.2d at 487.

The Ninth Circuit, in "interpreting" the involuntary servitude statutes in this case, improperly assumed "the role of statutory reviser[]." *Bifulco v. United States,* 447 U.S. 381, 401 (1980) (Burger, C.J., concurring). A grant of certiorari is necessary to clarify the proper role and function of a federal court when confronted with a question of statutory construction.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

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APPENDIX

For Publication

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant, vs. DAVID MUSSRY, ELSA SINGMAN NEE MUSSRY, LILY JUDAH NEE MUSSRY, also known as LULU, NASIM MUSSRY, JACK SASSOON, NEE MUSSRY, MOSES ASLAN, MORDECAI SASSOON, also known as MOODY SASSOON, also known as MAUDY SASSOON, SAUL MIZRAHIE, AL MIZRAHIE, Defendants-Appellees.	NO. 83-5093 D.C. NO. CR 82-802-01-RG **OPINION**

Appeal from the United States District Court
for the Central District of California
Richard Gadbois, Jr., District Judge, Presiding
Argued and Submitted October 3, 1983

BEFORE: FARRIS and REINHARDT, Circuit Judges, and SOLOMON,* District Judge

REINHARDT, Circuit Judge:

The defendants were indicted on charges of holding individuals in peonage and involuntary servitude. The

*Honorable Gus J. Solomon, Senior District Judge for the District of Oregon, sitting by designation.

district court dismissed most of the counts. It concluded that those counts failed to sufficiently charge the defendants with a "holding" in involuntary servitude under 18 U.S.C. §§1581, 1583, and 1584 (1982) because they failed to allege that the defendants used or threatened to use law or force. We hold that a violation of the peonage and involuntary servitude statutes may occur through conduct other than the use or threatened use of law or force and that all of the counts are sufficient to charge the defendants with the crimes enumerated. Accordingly, we reverse.

The defendants are charged with violating 18 U.S.C. §§1581 (holding in peonage), 1583 (enticement into involuntary servitude), 1584 (holding in involuntary servitude), and 371 (conspiracy). The indictment and bill of particulars allege that the defendants unlawfully held poor, non-English speaking Indonesian servants against their will by enticing them to travel to the United States, paying them little money for their services, and withholding their passports and return airline tickets, while requiring them to work off, as servants, the debts resulting from the costs of their transportation. The government claims that the defendants' conduct effectively coerced the workers into remaining in their service and therefore constituted a holding in involuntary servitude.

According to the indictment and bill of particulars: The Indonesian servants were required to work up to 15 hours per day seven days a week. The defendants routinely denied all requests for vacations. Most of the servants cleaned the defendants' houses, cooked meals for the defendants, massaged them, and served them in a variety of other ways. Some did landscaping and gardening and engaged in household construction for the defendants. All of the servants lived in the defendants' homes.

The district court dismissed all counts under 18 U.S.C. §§1581, 1583, and 1584 which failed to allege that the defendants used, or threatened to use, law or force to hold the workers against their will.[1] The district court also deleted all references to involuntary servitude, peonage, and slavery from the conspiracy count.

The government contends that the district court misconstrued the law when it concluded that a "holding" in involuntary servitude can be accomplished only through the use, or threatened use, of law or physical force. Accordingly, the government urges that the district court erred in holding that the indictment and bill of particulars are not sufficient to charge the defendants with violations of the statutes.

We have jurisdiction to review the dismissal of the substantive counts and the partial dismissal of the conspiracy count under 18 U.S.C. §3731 (1982). *See United States v. Marubeni America Corp.*, 611 F.2d 763, 764-65 (9th Cir. 1980).

"HOLDING" IN INVOLUNTARY SERVITUDE

18 U.S.C. §1584, in relevant part, provides that "[w]hoever knowingly and willfully holds to involuntary servitude . . . any other person for any term . . . shall be fined . . . or imprisoned . . . or both."[2] The question of

[1]The district court denied a motion to dismiss four counts alleging violations of 18 U.S.C. §§1581 and 1584. Those counts alleged that the defendants warned the servants that they would be arrested if they attempted to leave the defendants' house. The district court also refused to dismiss one count alleging a violation of 18 U.S.C. §1583. That count alleged that the defendants kept one worker in their custody while in Indonesia and tricked him into boarding an airplane flying to the United States. These counts are not challenged here.

[2]18 U.S.C. §1581, in relevant part, provides that "[w]hoever holds or returns any person to a condition of peonage . . . shall be fined . . . or imprisoned . . . or both."

what is sufficient to constitute a "holding" under 18 U.S.C. § § 1581, 1583, and 1584 is a question of law that we address *de novo. See, e.g., Donovan v. Southern California Gas Co.*, 715 F.2d 1405, 1407 (9th Cir. 1983) (per curiam). Because we are reviewing a dismissal of the charges, we need only decide whether the indictment and bill of particulars are sufficient to *charge* the defendants with a criminal offense, rather than whether sufficient facts have been adduced to *prove* that the defendants committed a crime. *See United States v. Buckley,* 689 F.2d 893, 897 (9th Cir. 1982), *cert. denied,* 103 S. Ct. 1778 (1983).

The 13th amendment and its enforcing statutes are designed to apply to a variety of circumstances and conditions. Neither is limited to the classic form of slavery. Both apply to contemporary as well as to historic forms of involuntary servitude. The amendment and statutes were intended

> not merely to end slavery but to maintain a system of completely free and voluntary labor

18 U.S.C. §1583, in relevant part, provides that "[w]hoever kidnaps or carries away any other person, with the intent that such other person be sold into involuntary servitude, or held as a slave . . . [s]hall be fined . . . or imprisoned . . . or both."

The government concedes that, because peonage is involuntary servitude for the purpose of liquidating a debt, *see Clyatt v. United States*, 197 U.S. 207, 215 (1905), it must establish a holding in involuntary servitude in order to charge the defendants with violating section 1581. The defendants' sole objection to the indictment and bill of particulars is that the government does not sufficiently charge them with a holding in involuntary servitude. Therefore, in reviewing the dismissal of all of the counts, we need only decide whether the indictment and bill of particulars are sufficient to charge the defendants with a holding in involuntary servitude.

Hereafter, we refer to all three statutes collectively as the involuntary servitude statutes.

> throughout the United States. . . . [I]n general, the defense against oppressive hours, pay, working conditions, or treatment is the right to change employers. When the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work.

Pollock v. Williams, 322 U.S. 4, 17-18 (1944); *see Bailey v. Alabama,* 219 U.S. 219, 241 (1911); *United States v. Booker,* 655 F.2d 562, 564, 566 (4th Cir. 1981) ("The amendment and the legislation were intended to eradicate not merely the formal system of slavery that existed in the southern states prior to the Civil War, but all forms of compulsory, involuntary service."; citations omitted); *see also* Schnapper, *Perpetuation of Past Discrimination,* 96 Harv. L. Rev. 828, 831-36 (1983) (recounting history surrounding Southern legislatures' enactment of black codes that were designed to " 'lock' former slaves into the service of their old masters"). Because of that purpose, it has long been recognized that "[t]he words involuntary servitude have a 'larger meaning than slavery.' " *Bailey v. Alabama,* 219 U.S. at 241 (quoting *The Slaughter-House Cases,* 83 U.S. (16 Wall.) 36, 69 (1872)).

In deciding the issues before us, we must consider the realities of modern economic life: yesterday's slave may be today's migrant worker or domestic servant. *See United States v. Booker,* 655 F.2d 562, 566 (4th Cir. 1981).[3] Today's involuntary servitor is not always black;

[3]The most recent applications of the involuntary servitude statutes have involved migrant farm laborers. *See United States v. Harris,* 701 F.2d 1095 (4th Cir.), *cert. denied,* 103 S. Ct. 3554 (1983); *United States v. Booker,* 655 F.2d 562 (4th Cir. 1981); *United States v.*

he or she may just as well be Asian, Hispanic, or a member of some other minority group.[4] Also, the methods of subjugating people's wills have changed from blatant slavery to more subtle, if equally effective, forms of coercion.

The question of what forms of coercion may serve as the basis for a finding of a violation of the involuntary servitude statutes is not a simple one. In *United States v. Shackney,* 333 F.2d 475, 487 (2d Cir. 1964), the Second Circuit held that "[t]here must be 'law or force' that 'compel[led] performance or a continuance of the service' " in order for there to be such a finding. (*quoting Clyatt v. United States,* 197 U.S. 207, 215-16 (1905)).[5] Relying

Bibbs, 564 F.2d 1165 (5th Cir. 1977), *cert. denied,* 435 U.S. 1007 (1978). The reason is evident. As the Fourth Circuit noted,

> [t]he statutes [were designed to] protect[] persons similarly situated to the migrant workers of our own time. They were persons without property and without skills save those in tending the fields. With little education, little money and little hope, they easily fell prey to the tempting offers of "powerful and unscrupulous" individuals . . . who would soon assert complete control over their lives. . . . [T]he statute must be read not only to render criminal the evil Congress sought to eradicate so long ago but, as well, its Twentieth Century counterpart.

United States v. Booker, 655 F.2d 562, 566 (4th Cir. 1981) (citation omitted).

[4]We do not mean to suggest that the 13th amendment and its implementing statutes are not applicable to Caucasians as well. *See Hodges v. United States,* 203 U.S. 1, 16-17 (1906), *overruled on other grounds, Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 442-43 n.78 (1968). However, at the present moment in our history, minority group members, and particularly undocumented aliens, are the ones most likely to be the victims when violations of those statutes occur.

[5]The language in *Clyatt v. United States,* 197 U.S. 207, 215-16 (1905), which was quoted in *Shackney,* was not a holding but merely part of a general discussion that explained the difference between compulsory and free labor; labor is not compulsory even if the person

on *Shackney,* the defendants claim that, because the indictment and bill of particulars do not allege the use, or threatened use, of law or *physical* force, the district court was correct in dismissing the charges.

We agree with the defendants that the most reasonable interpretation of *Shackney* is that a holding in involuntary servitude may occur only when there is the use, or threatened use, of law or physical force. However, while a test that looks to the use of law or physical force attempts to draw a clear line between lawful and unlawful conduct and has the apparent advantage of simplicity, it is too narrow to fully implement the purpose of the 13th amendment and its enforcing statutes. That a broader test is required was recognized in Judge Dimock's concurring opinion:

> [the] meaning of "involuntary" . . . deal[s] only with the will of the servitor. That word raises the question of whether the will of the servitor has been subjugated, i.e., whether he has been rendered incapable of making a rational choice, and not the question of what were the means by which the servitude was imposed. . . . Where the subjugation of the will of the servant is so complete as to render him incapable of making a rational choice, the servitude is involuntary within the terms of the statute . . . .

Shackney, 333 F.2d at 487-88 (Dimock, J., concurring).

The essence of a holding in involuntary servitude is the exercise of control by one individual over another so that the latter is coerced into laboring for the former. *See Bailey v. Alabama,* 219 U.S. 219, 241 (1911); *Wicks v.*

may be subjected to a civil action for breach of contract. *Clyatt* does not in any way suggest that the "force" compelling continued labor must be physical force.

Southern Pacific Railroad Co., 231 F.2d 130, 138 (9th Cir.), *cert denied,* 351 U.S. 946 (1956). The use, or threatened use, of law or physical force is the most common method of forcing another to enter into or remain in a state of involuntary servitude. *See, e.g., United States v. Harris,* 701 F.2d 1095, 1098 (4th Cir.), *cert. denied,* 103 S. Ct. 3554 (1983); *United States v. Booker,* 655 F.2d 562, 563 (4th Cir. 1981). However, "the means or method of coercion" is not the determinative factor in deciding whether there is a holding. *Pierce v. United States,* 146 F.2d 84, 86 (5th Cir. 1944); *see United States v. Bibbs,* 564 F.2d 1165, 1167 (5th Cir. 1977), *cert. denied,* 435 U.S. 1007 (1978); *Shackney,* 333 F.2d at 487-88 (Dimock, J., concurring).

Conduct other than the use, or threatened use, of law or physical force may, under some circumstances, have the same effect as the more traditional forms of coercion — or may even be more coercive; such conduct, therefore, may violate the 13th amendment and its enforcing statutes. The crucial factor is whether a person intends to and does coerce an individual into his service by subjugating the will of the other person. A holding in involuntary servitude occurs when an individual coerces another into his service by improper or wrongful conduct that is intended to cause, and does cause, the other person to believe that he or she has no alternative but to perform the labor.

In determining the question of involuntariness, the court should consider whether the challenged conduct would have had the claimed effect upon a reasonable person of the same general background and experience. Thus, the particular individual's background is relevant in deciding whether he or she was coerced into laboring for the defendant. *E.g., Pierce v. United States,* 146 F.2d 84, 85-86 (5th Cir. 1944); *United States v. Ingalls,* 73 F. Supp. 76 (S.D. Cal. 1947); *see United States v. Reynolds,*

235 U.S. 133, 150 (1914) (Holmes, J., concurring); *Shackney,* 333 F.2d at 488 (Dimock, J., concurring); Shapiro, *Involuntary Servitude: The Need For a More Flexible Approach,* 19 Rut. L. Rev. 65, 81-84 (1964).

We recognize that economic necessity may force persons to accept jobs that they would prefer not to perform or to work for wages they would prefer not to work for. Such persons may feel coerced into laboring at those jobs. That coercion, however, results from societal conditions and not from the employer's conduct. Only improper or wrongful conduct on the part of an employer subjects him to prosecution. To illustrate this point further, an employer who truthfully informs an individual that there are no other available jobs in the market, merely provides an opportunity for a person to work for low wages, or simply takes advantage of circumstances created by others is not guilty of an offense. An employer who has not engaged in improper or wrongful conduct has not violated the law. It is the act of the employer, as well as the effect upon the worker, that the 13th amendment and its enforcing statutes address.

Here, the bill of particulars alleges that the Indonesian servants generally had almost no education, were unskilled, spoke little, if any, English, and had never been outside Indonesia. Although they received higher wages in the United States than they had received in Indonesia, their wages were far below the minimum wage. Most of the workers were in the United States illegally. They were brought here by the defendants. The defendants allegedly compelled the servants to surrender their passports and return airplane tickets, and required them to work in their employ in order to repay the costs of their transportation to the United States. In short, the government claims that

> [the defendants] knowingly placed [the Indonesian servants] in a strange country where

> [they] had no friends, had nowhere to go, did not speak English, had no work permit, social security card, or identification, no passport or return airline ticket to return to Indonesia, [were] here as . . . illegal alien[s], with no means by which to seek other employment, and with insufficient funds to break [their] contract[s] by paying back to defendant[s] the alleged expenses incurred in getting . . . here.

Bill of Particulars, page 16; *see id.* page 30. Given these allegations, and particularly those relating to the retention of the passports and airline tickets, we cannot (for purposes of a motion to dismiss the indictment) view the defendants as "innocent" parties to the traditional employer-employee relationship.[6]

The indictment and bill of particulars allege conduct that, if proved, is sufficient to demonstrate improper or wrongful acts by the defendants that were intended to coerce the Indonesian servants into performing service for the defendants. The indictment sufficiently alleges that the conduct had the intended effect. Although the bill of particulars also indicates that some of the servants left the defendants' homes without apparent retaliation by the defendants, that is merely relevant evidence which could be introduced to rebut the government's case if the defendants claim that their conduct was not such as would

[6]The defendants suggest that, because the Indonesian servants voluntarily contracted to work for higher wages than they earned in Indonesia, the allegations are not sufficient to charge a holding in involuntary servitude. We disagree. Even though a person may come to a job voluntarily, subsequent coerced service constitutes involuntary servitude. *See United States v. Harris,* 701 F.2d at 1100. In addition, 18 U.S.C. §1581, which prohibits the holding of another in involuntary servitude for purposes of liquidating a debt, *see* note 2 *supra,* limits the ability to enforce a contract for labor.

have caused a reasonable person to become an involuntary servitor. The opportunity to escape, and even successful escape, is not enough in and of itself to preclude a finding that a person was held in involuntary servitude. *See United States v. Booker,* 655 F.2d 562, 567 (4th Cir. 1981); *United States v. Bibbs,* 564 F.2d 1165, 1168 (5th Cir. 1977), *cert. denied,* 435 U.S. 1007 (1978). All counts of the indictment, including those relating to the servants who left the defendants' homes, must stand.

THE VAGUENESS CHALLENGE

The defendants assert that if we conclude that a holding in involuntary servitude may be accomplished absent the use, or threatened use, of law or physical force, the statutes would be rendered so vague that they would violate the due process clause of the fourteenth amendment. We disagree.

In order to survive a vagueness challenge, "a penal statute [must] define the criminal offense with sufficient definiteness [so] that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson,* 103 S. Ct. 1855, 1858 (1983) (citations omitted); *see Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 498-99 (1982); *United States v. Ocegueda,* 564 F.2d 1363, 1365 (9th Cir. 1977). "[N]o individual [may] be forced to speculate, at peril of indictment, whether his conduct is prohibited." *Dunn v. United States,* 442 U.S. 100, 112 (1979) (*citing Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972)).

However, "[i]t is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of

the case at hand." *United States v. Mazurie,* 419 U.S. 544, 550 (1975) (citation omitted) (quoted in *United States v. Bohonus,* 628 F.2d 1167, 1173 (9th Cir.), *cert. denied,* 447 U.S. 928 (1980)). We therefore need only decide whether the defendants had fair notice that the conduct that they allegedly engaged in was prohibited.

To give fair notice of what constitutes a criminal offense, a statute need not be drafted as precisely as it possibly could have been:

> [F]ew words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded.

Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 340 (1952) (footnote omitted); *see United States v. Powell,* 423 U.S. 87, 94 (1975); *United States v. Wise,* 550 F.2d 1180, 1186 (9th Cir.), *cert. denied,* 434 U.S. 929 (1977). Accordingly, a penal statute should not be so narrowly "construed as to interfere with the federal government's ability to efficiently administer its criminal laws." *In re Subpoena of Persico,* 522 F.2d 41, 64 (2d Cir. 1975) (quoted in *United States v. Prueitt,* 540 F.2d 995, 1002 (9th Cir. 1976), *cert. denied sub nom., Temple v. United States,* 429 U.S. 1063 (1977)).

The language of 18 U.S.C. § § 1581, 1583, and 1584 is not the most precise. But the breadth in that language was necessary in order to prohibit new forms of compulsory labor that might arise — rather than just the type that existed in the ante-bellum South. The language is not so

opaque that ordinary people would not have notice that the conduct allegedly engaged in by the defendants was prohibited. Although close questions may arise in interpreting the language of a criminal statute, that alone does not render a statute unconstitutionally vague. *See Boyce Motor Lines,* 342 U.S. at 340; *United States v. Douglass,* 579 F.2d 545, 548 (9th Cir. 1978). Nor is the language so broad as to create the potential for arbitrary law enforcement.

"[T]he constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea.*" *Colautti v. Franklin,* 439 U.S. 379, 395 (1979) (citations omitted; footnote omitted); *see e.g., United States v. United States Gypsum Co.,* 438 U.S. 422, 434-46 (1978); *United States v. Wise,* 550 F.2d 1180, 1186 (9th Cir.), *cert. denied,* 434 U.S. 977 (1977). The fact that the statute requires that an individual must have acted with the intent of coercing another into his service goes a long way toward alleviating any vagueness problems. It is difficult to argue that a person did not have notice that certain conduct was illegal when the offense requires that the conduct be improper or wrongful and that the actor intend that the conduct have a coercive effect.

An inquiry into whether a "reasonable person" would be coerced into the service of another does not by itself create the potential for arbitrary and discriminatory enforcement. *See Coates v. City of Cincinnati,* 402 U.S. 611, 613 & n.3 (1971); *see also Chaplinsky v. New Hampshire,* 315 U.S. 568, 573 (1942) (relying on the fact that the state court had narrowed the statutory language to only prohibit speech that would incite "men of common intelligence" to fight, in upholding a criminal statute in the face of vagueness and first amendment challenges); *Standard Oil Co. v. United States,* 221 U.S. 1, 60 (1911)

("rule of reason" standard applied to determine whether conduct violated the criminal antitrust laws).

We expect that criminal prosecutions under the involuntary servitude and peonage statutes will occur only in rare circumstances. Here, the defendants had fair notice that their conduct, which, allegedly, was designed to have and did have an unlawful effect, was prohibited. The absence of a requirement that coercion be accomplished by means of physical force or law does not render the statutes unconstitutionally vague.

CONCLUSION

For purposes of 18 U.S.C. § § 1581, 1583, and 1584, the use, or threatened use, of law or physical force is not an essential element of a charge of "holding" in involuntary servitude. Other forms of coercion may also result in a violation of the involuntary servitude statutes. The allegations that the defendants engaged in specific improper or wrongful conduct with the intent to coerce the Indonesian servants into performing services for them involuntarily, and that the conduct had the intended effect, are sufficient to preclude dismissal. All counts in the indictment must stand.

The order of the district court dismissing the substantive counts and partially dismissing the conspiracy count is reversed and the case is remanded.

REVERSED AND REMANDED

APPENDIX "B"
A15

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant, vs. DAVID MUSSRY, ELSA SINGMAN NEE MUSSRY, LILY JUDAH NEE MUSSRY, also known as LULU, NASIM MUSSRY, JACK SASSOON NEE MUSSRY, MOSES ASLAN, MORDECAI SASSON, also known as MOODY SASSOON, also known as MAUDY SASSOON, SAUL MIZRAHIE, AL MIZRAHI, Defendants-Appellees.	NO. 83-5093 (Central Dist, Calif.) ORDER

Before: FARRIS and REINHARDT, Circuit Judges, and SOLOMON,* District Judge.

The panel as constituted has voted to deny the petition for rehearing. Judges Farris and Reinhardt have voted to reject the suggestion for rehearing en banc, and Judge Solomon has recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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*Honorable Gus J. Solomon, Senior District Judge for the District of Oregon, sitting by designation.

APPENDIX "C"
A17

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

— — —

HONORABLE RICHARD A. GADBOIS, JR.,
JUDGE PRESIDING

— — —

UNITED STATES OF AMERICA, Plaintiff, vs. DAVID MUSSRY, ELSA SINGMAN nee MUSSRY, LILY JUDAH nee MUSSRY, also known as LULU, NASIM MUSSRY, HILDA SASSOON nee MUSSRY, JACK SASSOON, MOSES ASLAN, MORDECAI SASSOON, also known as MOODY SASSOON, also known as MAUDY SASSOON, SAUL MIZRAHIE, AL MIZRAHIE, Defendants.	No. CR 82-802 RG VOLUME II Pages 109-213

REPORTER'S TRANSCRIPT OF PROCEEDINGS

January 17, January 31 and
March 4, 1983
Los Angeles, California

BURGESS D. TITUS, CSR No. 1661
Official Court Reporter
429-D U.S. Courthouse
312 North Spring Street
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* * *

(Page 192, line 16)

THE COURT: All right, gentlemen.

In preparing to rule on these motions, it was my obligation to search for the present state of the law relative to the charging statutes. I have done that, and I think that I've done it diligently, just as counsel have done their job, as Mr. Talcott pointed out. I've read every single authority on the subject, from the Thirteenth Amendment itself to the *Slaughter House* cases, through *Shackney,* and down to *Booker.*

I perceive the law in this area to be reasonably well developed, which is a conclusion that prohibits my selection of any novel theory or criterion, such as the "heightened personal interest" test, by which I would judge the "holding" requirement of the charging statutes.

I conclude that the legal standard for judging the sufficiency of a charge of either "peonage", as used in 1581, or "involuntary servitude", as used in the other statutes, involves:

(i) subjugation of the will of the servitor

(ii) which was accomplished by either law or force, or the meaningful threat of either, or, indeed, of any combination of the above, and

(iii) which compels service or the continuation of service.

Most of the holdings charged in the Indictment here involve presence in a strange country on the part of an alien, with no capability in its language, no friends to turn to for help, no work permit or Social Security card, custody of passport and return plane ticket in one of the

defendants rather than the alien, and no apparently ready means for seeking other employment.

That combination, while surely a baleful state of affairs, does not measure up to the "force or law" requirement that I perceive. Rather, it resembles the choice entailing "consequences that are exceedingly bad," described by Judge Friendly in the *Shackney* case.

Several of the 1581 and 1584 counts, however, are buttressed by at least a suggestion of the "force or law" criterion. And the Government should certainly, in my opinion, be allowed to proceed to trial and proof upon these counts. And they are:

Count No. 24, having to do with Ruminah Kaslim in that there is an allegation that if she went out, she would be arrested, and that statement was made by one of the defendants, or on the behalf of the defendants;

Count 30 I will permit to remain, although that's even a little more thin, because she was warned — Kartini was warned that she might be arrested. And it has to be observed that, notwithstanding such warning, she did run away twice from the place she was being kept;

No. 29, Casmita Marwani was also advised by Mussry that she might be picked up by the police.

Abdul Marwani was told pretty much the same thing, in addition to which he was beaten.

Those four 1581, 1582 and 1584 counts may remain. All other counts under Section 1584 and Section 1581 are now dismissed for failure to state the crime alleged

I reject the Government's characterization of the holding of the following aliens as being within the criteria I set out earlier — and I apologize for the pronunciation; I'll do the best I can — :

No. 25, Diporedjo was not — he was not expressly threatened with arrest.

And with regard to 21, 26 and 27, Wirjoredjo, Aliyas and Wahyuni, it is alleged that they had fears, but there's no allegation of where those fears came from, particularly that they were the result of any threats of the defendants.

With respect to the Section 1583 counts on enticement, there has been no response from the Government as to facts indicating intent to have any alien held in slavery. While one might assume knowledge on the part of those of the Mussry clan as to what the aliens were in for, by reason of the opinion I've just given, they were not, in most instances, in for slavery, in any event.

On the basis of what I know now about this case, I see no evidence of intent to commit the victims to involuntary servitude at the times their travel arrangements were made in Indonesia.

Accordingly, all Section 1583 counts are now dismissed, with the exception of Count 16, in which the Government might reasonably say to a trier of fact that Ngakan was spirited away; he was kept in custody even in Indonesia; he was tricked on to the airplane; and perhaps that is some index of intent, of the requisite intent of the statute.

I certainly want to call to the Government's attention that, notwithstanding the rulings just made, there is a lot of case left here. If the Government can prove what it has alleged in the Indictment and the Bill of Particulars, it will have brought to light concerted criminal activity of a serious nature, irrespective of the label put on it, and even with the pared down Indictment, those charges carry very significant penalties.

I was a little distressed — I may be overstating what was presented to us last time, but the suggestion on the part of

the Government that "we don't get on an airplane and come out here to prosecute immigration cases," if, indeed, that is their attitude, is inappropriate in this case.

Now let's talk about what happens.

MR. TALCOTT: Excuse me, your Honor. Did the Court make reference to Count 1, the conspiracy count?

THE COURT: Oh, yes. I can't throw the whole count out. It involves a lot of varying criminal activity. I think we're talking about deleting from the count references to slavery or peonage.

MR. TALCOTT: I would respectfully suggest to the Court that I don't believe that the Court can, nor the Government can, at this point, strike certain objectives which the grand jury considered in returning the Indictment that was set before them at that time.

The grand jurors, some 23 or so in number, considered the charge that was presented to them. For us to speculate now whether or not they would have returned that Indictment had not all of the elements or considerations set forth before them in its form as the Court is suggesting, would merely lead us to speculation and conclusion.

I would strongly urge the Court that the law is going to require that the count go out, because it includes as its basis the objectives of 1583 all of the enticement objectives. It sets forth all of the overt acts with respect to that.

With respect to all of the 1584 counts that were dismissed, those are all set forth as overt acts and as the objective of that, and it names people for consideration for indictment within that Count 1 which longer are applicable with respect to the peonage and the holding counts.

So, your Honor, I would strongly suggest that the proper way to handle that is to dismiss Count 1, for those reasons, and if the Government wishes to proceed on the

scaled down interpretation, that they must go back to the grand jury, submit it again, exclusive of these elements that the Court has now ruled on.

THE COURT: I don't have any difficulty with the proposition that the components of Count 1 are severable, logically and factually. Is it your position that they are not severable?

MR. TALCOTT: I am suggesting that the grand jury that returned that particular count considered it as a whole, and we don't know what they would have done had certain portions not been presented to them.

THE COURT: I think I can guess.

MR. TALCOTT: You can guess, but, you know — and I could probably guess, too, but that's not really our purpose, because then we're substituting ourselves for the grand jury, and that's always the problem.

THE COURT: Let's ask the Government to comment on that.

MR. GLENN: Your Honor, the United States would respectfully disagree with Mr. Talcott's conclusion that the entire count should be thrown out.

The grand jury considered each objective of the conspiracy count and voted to include each objective of the conspiracy count.

I would also point out that the Government need only prove one of the objectives at trial in order for the trier of fact to conclude that defendants are guilty of that conspiracy count.

I would also point out to your Honor that conspiracy and substantive crimes are separate, of course, and because the defendants may not have — because the facts we state, in the Court's view, may not have stated the crimes, the substantive crimes, does not mean that they

did not intend — they did not conspire to commit them, even if not accomplished.

THE COURT: All right. The motion for dismissal of Count 1 is denied.

MR. GLENN: Thank you, your Honor.

MR. VANDEVELDE: Your Honor, may I — in relation to — I don't mean to be speaking up after the Court has ruled, but the conspiracy count, is the Court indicating that those portions of the conspiracy count relating to the enticement, holding and peonage charges would be stricken in some manner?

THE COURT: I think they should be stricken, yes.

MR. VANDEVELDE: Fine. Thank you.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on July 16, 1984, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
1 First Street, N.E.
Washington, D.C. 20543
(Original and 40 copies)

Solicitor General
Department of Justice
Washington, D.C. 20530

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 16, 1984, at Los Angeles, California.

Robin J. McColgan
(Original signed)